United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1078

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-v-

JOHN BENIGNO,

Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Brief

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2

INDEX TO BRIEF

INDEX TO BRIEF (Cont'd. Page 2)

UNITED STATES COURT OF APPEALS
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- -x
UNITED STATES OF AMERICA,

Appellee,

-against- Docket No. 75-1078

JOHN BENIGNO,

Appellant.
- -x

STATEMENT

The appellant, together with Bryan Canniff, was charged in a three-count indictment with conspiring and substantively violating Sections 812, 841(a)(1) and 841(b)(1)(a) of Title 21, United States Code.

The appellant was found guilty as charged and sentenced to imprisonment for twenty-seven (27) months and to a three-year term of parole supervision thereafter. He has continuously remained at liberty having posted a personal recognizance bond.

He was represented at trial by Theodore Krieger who had been appointed under the Criminal Justice Act. Leave to proceed in forma pauperis having been granted, the assignment was continued by this Court.

The United States of America has been represented by the United States Attorney for the Southern District of New York, by Lawrence B. Pedowitz, an Assistant United States Attorney.

STATEMENT OF FACTS

The appellant and Bryan Canniff proceeded to trial before Judge Lee F. Gagliardi and a jury in the United States District Court for the Southern District of New York.

Prior to trial the appellant had moved to suppress objects seized at the time of his arrest. A hearing was had thereon and the motion denied.

The proof as adduced by the government in support of the indictment can, as initially applicable to the appellant, be synthesized in the following narration.

Joseph Sullivan, an agent of the Drug Enforcement Administration, testified that while working in an undercover capacity, an informant, Daniel Miller, introduced him to the co-defendant Bryan Canniff. The latter thereupon related that he had five ounces of cocaine which he wanted to sell for $3,500.00. Sullivan evidenced interest but stated that he wanted to be sure as to its quality. Whereupon Canniff responded that he would give him a sample thereof. Further negotiations ensued as to delivery concluding with an arrangement whereby the cocaine was to be sold by ounces.

Thereafter the appellant was arrested in an apartment at 525 East 81st Street, New York City, and contraband found therein.

Daniel Miller, the informant, testified that he had met Bryan Canniff and subsequently sold him narcotics. He

later met the appellant and discussed the sale of cocaine. Thereafter he met the appellant and Canniff at which time Benigno was alleged to have spoken to Agent Hall.

The latter thereupon testified that on October 17, 1973, he was conducting surveillance at which time the informant gave him the number of an apartment at 525 East 81st Street. He then arrested Bryan Canniff who stated that the cocaine had been obtained from one "John" who was awaiting his return with the money at a designated apartment.

Agent Hall further related that after being given a physical description of "John" he, in the company of others, arrested the appellant.

After the testimony of Joseph Barbato, a chemist employed by the Drug Enforcement Administration, the Government rested. A motion was thereupon made pursuant to Rule 29a of the Federal Rules of Criminal Procedure for a directed judgment of acwuittal, which was denied.

The defendant Bryan Canniff testified on his own behalf and claimed that he was entrapped.

The appellant, testifying on his own behalf, denied that he had ever met the informant, gone to his apartment, or ever spoken to him. He further stated that he had never spoken to anyone with respect to or transferred or sold narcotics.

He maintained that he had been hired to and was solely in the apartment to do construction work and carpentry. He conceded seeing contraband in the apartment but stressed that it did not belong to him-nor did he have anything to do with it.

The prosecutor thereupon began and continued a cross-examination which is set forth in Point One.

Both sides then rested and a motion for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure was made and denied.

After respective summations, the Court charged the jury, which thereupon deliberated and subsequently rendered a verdict of guilty as to both defendants on all counts.

A post-verdict motion to set aside the jury's verdict as against the weight of the evidence and the applicable law was made and denied.

POINT ONE

THE PROSECUTOR IMPROPERLY IMPEACHED THE APPELLANT'S CREDIBILITY BY PUTTING UNFOUNDED INQUIRIES AS TO FELONIES AS WELL AS TO AN ADJUDICATION AS A YOUTHFUL OFFENDER.

The appellant was asked on direct examination as to whether he had ever been convicted of a crime. He responded in the negative (Tr. 370).*

He was not asked whether he had ever been arrested. Nor was he asked as to whether he had ever had any legal difficulties as a juvenile or as a youth. He was not asked as to whether he had ever violated the law or ever committed any act of misconduct. Indeed he was not asked as to the possession of any spiritual attributes but solely as to whether he had ever been convicted of a crime. This sole query did not constitute an opening of the floodgates nor afford the prosecutor that absolution so as to run roughshod over the appellant's prior history. However, that is precisely what the prosecutor did, as is evidenced by the following excerpts of his cross-examination.

> " Q. Have you ever been convicted of a crime?
>
> A. No, sir.
>
> Q. How about grand larceny, auto?

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* The prefix "Tr." refers to the transcript of the trial.

A. No, sir.

MR. KRIEGER: Objection, your Honor.

THE COURT: He says no.

Q. Burglary?

A. No.

Q. You were never convicted as a youthful offender in the State of New York?

MR. KRIEGER: Objection. I respectfully move for the withdrawal of a jury and the declaration of a mistrial.

THE COURT: No.

MR. PEDOWITZ: Your Honor, my position is this has been opened.

THE COURT: I will permit it.

Q. Have you ever been convicted of burglary or grand larceny in the State of New York as a youthful offender?

MR. KRIEGER: Objection, your Honor.

THE COURT: Yes, sustained. Please, Mr. Pedowitz, get back at the lectern.

Q. Did you hear my question?

A. I was once charged --

MR. KRIEGER: If your Honor please, your Honor sustained my objection, I believe.

THE COURT: Yes, I did. "
(Tr. 379 - 381)

The broad query as to whether the appellant had ever been convicted of a crime, as well as the specific

inquiry as to "grand larceny, auto" and "burglary" were unfounded, prejudicial by the innuendos therein contained, and clearly, whether by design or recklessness, to portray the appellant as being a "bad man" and thus unworthy of belief.

Such procedure has been explicitly held to be improper and is violative of Sec. 5.7 of the Standards Relating To The Prosecution Function as promulgated by the American Bar Association Project on Standards for Criminal Justice. Said section provides that:

> " It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner cannot support by evidence. "

The prosecutor was supplied with the appellant's arrest record as compiled by the Federal Bureau of Investigation. Nowhere in that record was there anything to indicate that the appellant had been convicted of a "crime" generally or "grand larceny, auto" or "burglary" specifically. Obviously there was not a certified copy of a judgment of conviction as to either of the charges which could be used in refutation. The questions were simply put in an effort to degrade the appellant. Such prosecutorial conduct was characterized by the Standards, supra, in the following fashion, p. 126.

> " The attempt to communicate impressions by innuendo through questions which are answered in the negative, for example, 'Have you ever been convicted of the crime of robbery?' or 'Weren't you a member of the Communist Party?" or "Did you tell Mr. X that . . . ? " when the questioner has no evidence to support the innuendo, is an improper tactic which has often been condemned by the courts. See, e.g., Richardson v. United States, 150 F. 2d 58 (6th Cir. 1945); People v. DiPaolo, 355 Mich. 394, 115 N.W. 2d 78 (1962); State v. Flowers, 262 Minn. 164, 114 N.W. 2d 78 (1962). See generally 6 Wigmore, Evidence Sec. 1808(2) (1940). See also American College of Trial Lawyers, Code of Trial Conduct Secs. 20(c), (d), (g) (1963). "

It is well established that a witness cannot be asked whether he had been arrested or even indicted, for such are naught but a mere accusation of guilt. McCormick on Evidence, 2nd Ed. Sec. 43, p. 85, f.n. 52 ; Richardson on Evidence, Tenth Ed., Sec. 506. See also Rule 609 of the Rules of Evidence for the United States Courts and Magistrates.

The immediate objection to the Court to this line of question was not cured by its observation that in effect the prejudice and harm therein contained was cured by the appellant's denial. In actuality the harm was compounded when the appellant was asked "You were never convicted as a youthful offender in the State of New York?" (Tr. 380).

The immediate objection as well as the request for the withdrawal of a jury and the declaration of a mistrial resulted in the Court's utterance of a solitary "No" (Tr. 380).

To enhance the prejudice the prosecutor stated "Your Honor, my position is this has been opened" (Tr. 380).

To which the Court responded "I will permit it" (Tr. 380).

The Court was in error. Such an inquiry is precluded. United States v. Fay, 240 F. Supp. 848 (S.D.N.Y., Weinfeld, J.); People v. Rahming, 26 N.Y. 2d 411, 419; McCormick, supra, Sec. 43.

It is submitted that the record simply does not reflect a latitudinous direct examination that would permit the prosecutor to wend his way, oblivious of evidence and propriety, to ask "hit and run" questions.

Undaunted nonetheless the prosecutor asked the appellant:

> " Have you ever been convicted of burglary or grand larceny in the State of New York as a youthful offender?" (Tr. 380)

Aside from the inherent implausibility of the question, since a youthful offender is not "convicted" whether it be of "burglary", "grand larceny", or any other

crime, it was clearly meant to convey to the jury that the appellant was a "youthful felon".

Objection was immediately taken, and sustained (Tr. 380).

Impervious to the ruling of the Court, the prosecutor asked the appellant:

> " Did you hear my question?"
> (Tr. 380)

Upon being reminded that the Court had sustained the appellant's objection, he put the following questions to the appellant so as to emphasize and convey by repeated questioning what he was unable to supply by evidence.

> " Q. You have never been convicted of a crime in the State of New York, is that correct?
>
> A. Yes.
>
> Q. You have never been convicted of grand larceny?
>
> A. No, sir, I have never.
>
> Q. And you have never been convicted of burglary?
>
> A. No, sir, I haven't.
>
> Q. You are sure about that?
>
> A. Yes.
>
> MR. KRIEGER: I object, your Honor.
>
> THE COURT: The answer is yes, he is sure. All right."
> (Tr. 381)

It is submitted that in the instant cause where there existed a sharp issue of credibility, the persistent and unrestrained questioning as to whether the appellant had been convicted of non-existent felonies, as well as reference to his being a youthful offender was manifestly without justification or propriety, as well as an assault upon the appellant's constitutional right to testify on his own behalf.

POINT TWO

A HEARING SHOULD HAVE BEEN GRANTED AS TO THE VOLUNTARINESS OF ANY STATEMENT MADE BY THE APPELLANT DURING A PRE-ARRAIGNMENT PROSECUTORIAL ARRAIGNMENT.

Force was used in connection with the arrest of the appellant. Benigno claimed that he was shoved, pushed, pulled, thumbs put by his eyes, passed out, had ice cubes placed behind his back to revive him, and had initially thought that he was being robbed (H. 26, 28, 29). **

Agent Hall said that he used force to get through the door and he used force to put the appellant up against the wall, saw him get dizzy, pass out, and agents helped him to his feet (H. 25, S.M. 462, 463, 464). As such any post-arrest statements, in order to be admissible, must under the mandate of Jackson v. Denno, 378 U.S. 368 (1964) preliminarily hold to be voluntary under the preponderance of evidence standard set forth in Lego v. Twomey, 404 U.S. 553 (1972).

The appellant was arrested shortly after 5 o'clock p.m. on October 17, 1973, lodged in the House of Detention. He was interviewed by an Assistant United States Attorney on noon of the 18th, and arraigned at 4:05 p.m. He was apprised of the rights set forth in Miranda v. Arizona,

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** The prefix "H" refers to the minutes of the hearing held in connection with the appellant's motion to suppress.

384 U.S. 436 (1966) and responded that he would give only background information.

He was interrogated as to narcotic addiction, allegedly made a statement, and stated that he wished counsel.[1]

The issue of voluntariness as to any statements made during this interview had been raised prior to trial, i.e., during the hearing on a motion to suppress. At that time the following colloquy ensued:

> " Q. Mr. Benigno, do you remember being interviewed by an Assistant United States Attorney on October 18, 1973, the day after your arrest?
>
> MR. KRIEGER: If your Honor please, Mr. Pedowitz, I was led to believe that the entire matter of the interview would be something that would be kept in abeyance inasmuch as in the interview itself the defendant states that he is willing to speak to an Assistant District Attorney solely with respect to background, and I thought that unless a People v. Harris situation comes into being, when I spoke to you yesterday, it was my understanding -- I may be at error, but my understanding was that we are not going to concern ourselves with the Q and A unless possibly on a cross at which time we could go into the question of the voluntariness.
>
> MR. PEDOWITZ: Let me say two things, your Honor. First of all, I only

1. The writer was on November 5, 1973, eighteen (18) days thereafter, appointed to represent the appellant.

intend to ask the questions relating to statements given in the background questions. Secondly, I think this is a Harris v. New York situation, but I don't think we necessarily need to go into the statement because I am just going to ask about the background statements.

THE COURT: He is not goint to go into what you are objecting to.

MR. PEDOWITZ: Is that sufficient, Mr. Krieger? I only intend to ask in relation to these statements.

MR. KRIEGER: You mean as to whether he was there? Just as to this?

MR. PEDOWITZ: Yes.

MR. KRIEGER: All right. No problem." (H. 31 - 32)

On cross-examination the prosecutor made reference to the aforesaid interview, at which time the appellant again brought up the question of voluntariness and requested a hearing thereon (Tr. 387-393). The prosecutor in opposing the application, stated that he was offering the statement not as admissions but rather under Harris v. New York[2], as to prior inconsistent statements.

The court held that it was admissible as a prior inconsistent statement, voluntary or otherwise, that it may come in (Tr. 395) (Emphasis supplied).

It is respectfully submitted that the ruling of

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2. 401 U.S. 222 (1971).

the learned trial judge was clear error inasmuch as Harris v. New York, in no way precludes raising the issue of voluntariness, and the holding herein simply means that even if an admission is obtained without full Miranda compliance it can be used on cross-examination as an impeachment.

Harris, supra, clearly set forth, at 224, in direct contrast to the instant cause that:

> " Petitioner makes no claim that the statements made to the police were coerced or involuntary."

The appellant repeatedly stressed the issue of voluntariness and not Miranda.

> " MR. KRIEGER: I am not concerned as to Miranda. I am concerned as to basic lack of voluntariness. Something happened to him in the apartment, as a result of which he passed out. He then spends the night in jail. He is then brought before an Assistant United States Attorney before he is brought to a magistrate. Only after he goes through the magistrate is counsel assigned to represent him, he being an indigent. He is then out on bail, he then comes to see me." (Tr. 396)

The Government's position was that the statement was offered only as a prior inconsistency under Harris v. New York, supra (Tr. 400) The Court erroneously concluded that under the authority therein it was obliged to allow it. It is submitted that the said holding was manifestly

prejudicial as set forth in the following excerpt:

" Q. Mr. Benigno, do you recall being interviewed by Assistant United States Attorney James Levin on October 18, 1973?

A. Yes.

MR. PEDOWITZ: Your Honor, I'd ask that this page be marked --

THE COURT: No, I'd rather have you ask whatever question you have from the lectern.

MR. PEDOWITZ: I just wanted to refresh the witness' recollection.

THE COURT: Please do it.

Q. Do you recall being asked whether or not you used cocaine on that particular day?

A. No, sir.

Q. Do you recall being asked whether you were an addict?

A. No, sir.

MR. PEDOWITZ: Could I please have this marked as Government's Exhibit --

MR. KRIEGER: Objection, your Honor.

THE COURT: Yes, yes.

MR. PEDOWITZ: To refresh the witness' recollection, your Honor?

THE COURT: I understand.

MR. KRIEGER: He has already answered.

THE COURT: Please do it this way. I'd ask you to go to something else.

MR. PEDOWITZ: Certainly, your Honor. " (Tr. 413 - 415).

The harm was in no way minimized by the appellant denying that he had even recalled when being interviewed by the Assistant United States Attorney as to whether he was asked whether he was an addict.

The issue was again rekindled when the appellant was questioned as to whether he had made a statement during the interview that the co-defendant Bryan Canniff and "John Aponte" were in the apartment together. Objection was taken and the Court held that it was not "background material",[3] and that it would conduct a hearing as to voluntariness. However it did not do so and over objection he was queried as to what he had told an Assistant United States Attorney with respect to Canniff and Aponte being in the apartment together (Tr. 443-447).

The failure and steadfast refusal of the Court to grant a hearing as to the issue of voluntariness under the circumstances heretofore set forth constituted reversible error.

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3. (Tr. 441-442)

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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KRIEGER - USA V. BENIGNO

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of May , 1975 deponent served the within BRIEF upon U.S. Atty., Southern Dist. of NY

attonrye(s) for Appellee

in this action, at

U.S. Courthouse, Foley, Square, New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
.....
ROBERT BAILEY

Sworn to before me, this
16 day of May , 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976